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No. 06-1499

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In The

Supreme Court of the United States

MEGHAN BUSSELL,

Petitioner,

v.

MOTOROLA, INC., a Delaware corporation
and ADECCO EMPLOYMENT SERVICES, INC.,
a Delaware corporation,

Respondents.

On Petition For Writ Of Certiorari
To The Eleventh Circuit Court Of Appeals

REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO COUNTERSTATEMENTS OF CASE

Defendant Motorola argues that because the Court of Appeals stated that Bussell's position "represents a misreading of the record and either distorts or exaggerates the evidence and testimony in the record" (*Motorola's Response* at 1), this Court should not grant *certiorari* review. No court below ever identified *any* of the alleged distortions or misrepresentations. In fact, Bussell's Response to Defendants' Motions for Summary Judgment and her Briefs in the Court of Appeals set forth block quoted evidence, much like her statement of the case in her Petition for Certiorari. Those long quotes of record evidence taken from depositions have not been distorted or misrepresented in any way. Rather, it is the Defendants' Statement of the Cases in their Response Briefs that contain distortions and misrepresentations, and they do not contain a summary of the facts of the case in the light most favorable to Bussell, which is the required standard under Rule 56. Every factual statement made by Bussell to the district court and to the Court of Appeals, to the extent that it was not a block quote, was supported by a correct citation to record evidence.

An example of a misrepresentation of the record by Defendant Motorola is its statement that "nothing in the record suggests that Pennington had authority to make decisions on permanent hires." (*Motorola's Response* at 16). Contrary to Motorola's representation, Karge represented to Bussell that Pennington did in fact have the authority to disallow Bussell from becoming a permanent Motorola employee, because after Bussell complained to Karge about having her pants pulled down by Render, Karge told Bussell that she was "no longer eligible to be made [a] Motorolin [a permanent Motorola employee] because Laila [Pennington] has made it impossible for [you]." (R2-109-68). This is just one example. Peppered throughout the Defendants' Briefs are significant stretches of the record evidence, including Defendants drawing inferences from facts in their favor, rather than

in Bussell's favor (the non-moving party) as required by Rule 56. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456 (1992).

An example of a misrepresentation of the record by Adecco is its assertion that Bussell "relies on [direct] evidence that the courts below correctly determined was inadmissible hearsay." (*Adecco's Response* at 2). The courts below, although the issue of whether the direct evidence was inadmissible hearsay or not was presented to them, did not make a finding one way or the other on that issue, and even Motorola agrees, as it stated in its Response, that "the district court never determined whether the statement [the direct evidence] was either hearsay or direct evidence." (*Motorola's Response* at 14).

Another example of a misrepresentation of the record by Adecco is its assertion that Bussell was never improperly docked pay. (*Adecco's Response* at 18-19). Even Motorola admitted in its Response Brief to the Eleventh Circuit that Bussell had her pay docked. (*Motorola's Response Brief to Direct Appeal to Eleventh Circuit* at 48) (citing R2-78-159-61).

REASONS FOR GRANTING THE WRIT

I. CONCERNING THE QUESTION PRESENTED PERTAINING TO DIRECT EVIDENCE, (1) BUSSELL PRESENTED HER DIRECT EVIDENCE ARGUMENTS BELOW; (2) THE DIRECT EVIDENCE IS NOT INADMISSIBLE HEARSAY, AND (3) THERE IS AN ADMITTED SPLIT IN THE CIRCUIT COURTS OF APPEALS REGARDING WHAT CONSTITUTES "DIRECT EVIDENCE" AND ITS USE AND EFFECTS IN AN EMPLOYMENT CASE.

Initially, the Court should note that Respondent Adecco has admitted that there is a split in the circuits concerning the standard for direct evidence in an employment case, and the effect of such a finding on the case. (*Adecco Brief* at 7).

There is direct evidence of sexual harassment, because both Respondents found that Bussell was sexually harassed, and there is evidence that she was retaliated against because she complained of sexual harassment; such arguments were clearly raised below, as set forth below. Covington conceded that the offensive comments that Bussell's co-workers told her Render was uttering created a hostile work environment. (*See Petition for Certiorari* at 8) (quoting Covington's findings which state that Render's "admitted" "inappropriate, foul and abusive language" "contribut[ed] to a hostile/intimidating work environment and is in violation of Motorola's Policy").

Motorola's Statement to the EEOC stated that "Render was given an incident warning and put on probation for a one year period with the understanding that any further violations of the sexual harassment policy would result in his immediate termination." (R2-116-180-81). Martha Jaramillo, a high-level management of official of Motorola, who was the ultimate decision-maker concerning the discipline and resolution arising out of Bussell's complaints, testified that Render "created a hostile work environment discussing strip clubs and making comments and unwanted words." (R2-97-100).

In Karge's findings concerning the sexual harassment allegations, Karge found, on January 29, 2001, as follows: "hostile work environment Reason: Work Conditions was the reason. Resigned due to continuing harassment, and being made to feel uncomfortable. Because the sexual harassment case was so drawn out and not alot [sic] of support in her dept which was causing her to get ill. . . ." (R2-93-Ex.21) (dated Feb. 2 and 15, 2001). Karge testified that these conclusions were his own, and he agrees with them (R2-112-173-74), which is contrary to Motorola's representation that Karge's journal entry was simply Bussell's view. (*Motorola's Brief* at 16). Further, Adecco argues that Bussell was sent home because she was ill, which had nothing to do with her complaints of harassment (*Adecco's Response* at 19), but the above statement from Karge's journal clearly shows that Bussell was becoming ill *because of* the harassment, and the block-quote on page 11 of Motorola's Brief clearly sets forth that Bussell was becoming ill because of the harassment.

Direct evidence of retaliation exists, because Karge told Bussell that she was not going to be made a permanent Motorola employee (a "Motorolan") "because [she] complained too much." (R2-109-159). On pages 268 and 168, Bussell testified that "Karge told [Bussell] . . . that [she would not be a permanent Motorola employee] because she was complaining. . . ." (R2-110-268, 168).

There is direct evidence of constructive discharge, because Kathy Brodeur (one of Adecco's managers) testified that Bussell did not quit. (R2-99-92). Brodeur answered "yeah" when asked if Bussell was forced out of her employment "due to continuing harassment." (R2-99-168).

These arguments (the foregoing five paragraphs) were clearly raised below. See *Bussell's Statement of Disputed Facts in Opposition to Defendants' Motions for Summary Judgment* (pp. 13, 15, 16, 127, 18; ¶¶ 88, 114-16, 120, 125-27, 135), and *Memorandum of Law in Opposition to Summary Judgment* (pp. 2, 8, 13-16, 17, and 20), and (*Eleventh Circuit Brief* at pp. 26, 30, 31-32, 33, and 35). Contrary to the Defendants' assertions that this case does not present an appropriate vehicle for addressing the direct-evidence circuit conflict, these various different forms of direct evidence present a virtually model case, because they give the Court various factual scenarios in which to elaborate concerning what evidence is truly direct evidence, and why, and what effect that evidence has on the case. Defendants both made the arguments (that the evidence was not argued below) previously, and this Court granted *certiorari* the first time the case was before it.

The comments (direct evidence) are not inadmissible hearsay or double hearsay, but rather clearly admissions by a party-opponent, because they come from management personnel discussing employment decisions in the course and scope of their employment. Fed. R. Evid. 801(d)(2).

A former Fifth Circuit case is directly on point here, and requires the conclusion that the evidence in question is not hearsay. In *Kingsley v. Baker/Beech-Nut Corp.*, 546 F.2d 1136, 1141 (5th Cir. 1977), the plaintiff-employee's supervisor (Jackson) made a comment over the telephone

that was overheard by another employee. The employee's testimony (about what Jackson said) was held to be non-hearsay (under Rule 801(d)(2)(C)), as follows:

> Trial evidence established that Jackson [the main protagonist] was Kingsley's [the plaintiff] superior within the Baker/Beech-Nut Sales Division, that Jackson was responsible for appraising Kingsley's work, and that Jackson reported these evaluations to his superiors who in turn acted upon them. It is clear, therefore, that Jackson had the authority from Baker/Beech-Nut to make the statements quoted from his telephone conversation. . . . Accordingly, Jackson's statements are not excludable hearsay and are admissible.

Kingsley v. Baker/Beech-Nut Corp., 546 F.2d 1136, 1141 (5th Cir. 1977).

Adecco seizes on the fact that Bussell does not claim that she heard the alleged retaliatory statement from Pennington directly. It does not matter, because both statements are non-hearsay, as they constitute admissions by a party-opponent. As stated, management officials acting in their representative capacities made these statements. Karge, Bussell's supervisor, was instructing Bussell as to what employment decision Pennington decided to make concerning Bussell (not allowing her to be a permanent Motorola employee). The entire context of the conversation was Karge informing Bussell how Pennington was going to retaliate against her. Karge, as Bussell's supervisor, was the appropriate person to tell Bussell of Pennington's decision.

In this case, both prongs of hearsay clearly fall into Rule 801(d)(2)(A)'s scope, because both Karge and Pennington were managing agents. Pennington specifically admitted that she was a manager, and Karge is unquestionably a managing agent, because he supervised 400-500 people at the Motorola job site for Adecco. Accordingly, Bussell's testimony that Karge told her that Pennington told him that Bussell was not going to be made a permanent employee because she complained too much about harassment and retaliation is not hearsay, because neither

prong of the two prongs is hearsay, because both prongs consist of statements uttered by managers.

Likewise, *Zaben* does not require the conclusion that Bussell's statement is hearsay. In *Zaben*, two low-level employees heard rumors that unidentified management officials had said that they wanted to get rid of the older workers. *Zaben*, 129 F.3d at 1455. The low-level employees had nothing to do with the employment decision which affected Mr. Zaben. The court found that Zaben's testimony about what the two low-level employees told him "present[ed] a double hearsay problem because the declarants seemed to be repeating what other unidentified, declarants had told them." *Id.* at 1455. Mr. Zaben could not establish a hearsay exception, because he could not identify the declarants. Moreover, the court noted that Mr. Zaben ran into another hearsay problem, that being that the two low-level supervisors had no involvement or authority over the employment decisions in question, and therefore were really only repeating rumors.

The *Zaben* case specifically approved of the exact situation in this case as not constituting hearsay, as the court cited approvingly to *Hybert v. Hearst Corp.*, 900 F.2d 1050, 1053 (7th Cir. 1990), noting that "statements by the plaintiff's supervisor about 'the attitude, intentions and/or policy of the higher-ups' in management were properly admitted into evidence." *Id.* at 1456 (citing *Hybert*). The situation in the *Hybert* case that *Zaben* approved, is precisely the situation here, given the relationships between Karge, Bussell's supervisor, and Pennington as Bussell's Motorola supervisor.

Bussell testified that Karge made it clear that Pennington had the power to prevent Bussell from becoming a permanent employee, as follows:

> A: [After the pulling-down-the-pants incident, which Bussell complained about as being sex harassment]. Yes. I told Tom what had happened. Tom came back to me. All of a sudden, Tom's telling me that both Russ and I are no longer eligible to be made

> Motorolins because Laila has made it impossible for us.

(R2-109-168). After six to eight months at work, the temporary employees were being made permanent employees. (R2-109-169). Bussell testified as follows:

> Q: Did anyone tell you when you went to Motorola that this was a six-month assignment?
>
> A: Nope. They told us it was temporary, but they said it could be six months to a year to longer, but that we had the opportunity after six months to be transferred to be a Motorolin.

(R2-109-183). Bussell was told that she was not going to move up to such a position. (R2-109-265). Again, Defendants' argument that it is undisputed that Bussell could never have been made a permanent Motorola employee is a disputed issue of material fact.

The fact is that the circuits are not in agreement on what evidence is direct or not, and if so, what the affects are of such evidence. The Fifth Circuit has recently wondered whether *Desert Palace* alters the *Price Waterhouse/ McDonnell Douglas* dichotomy – namely, whether the existence of direct evidence takes the case out of the *McDonnell Douglas* framework, and into the *Price Waterhouse* framework, putting the burden on the defendant-employer to prove that it would have made the challenged decision in the absence of discrimination. *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 310 & n.7 (5th Cir. 2004). The *Rachid* court, and several courts of appeals, held that direct evidence requires the denial of summary judgment for the defendant-employer. *Id.* (applying both the *McDonnell Douglas* and *Price Waterhouse* frameworks); *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 463 (6th Cir. 2003) (holding that a plaintiff will survive summary judgment by proffering direct evidence of discrimination, applying the *Price Waterhouse* framework); *EEOC v. Liberal R-II Sch. Dist.*, 314 F.3d 920 (8th Cir. 2002) (holding same, and finding that direct evidence consisted of the employee

being told he was too old to perform the job, and employer referred to his age as being a reason for termination at an unemployment proceeding).

Although the Eleventh Circuit has long acknowledged that the utterance of statements demonstrating discriminatory animus by the decision-maker constitute direct evidence of discrimination, *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1189-90 (11th Cir. 1997) (collecting cases), the Eleventh Circuit has recently held that evidence of statements demonstrating discriminatory animus (direct evidence) do not warrant the denial of summary judgment. *Crawford v. City of Fairburn*, 482 F.3d 1305, 1309 (11th Cir. 2007) (analyzing a discrimination case via the *McDonnell Douglas* framework, and affirming summary judgment to the employer, even though evidence existed that the decision-maker exhibited discriminatory animus toward the plaintiff's protected classification, which previous panel opinions held constitute direct evidence under the *Price Waterhouse* framework). The confusion in the circuits concerning what constitutes direct evidence, and when such evidence exists, how it affects the case, needs to be resolved to provide needed clarity in this area of the law.

The Defendants claim that the panel opinion was correct in holding that Bussell did not suffer actionable adverse employment action. Bussell suffered adverse employment action, and Motorola admitted that Bussell had her pay docked. (*Motorola's Brief to Eleventh Circuit* at 48) (citing R2-78-159-161). Further, as argued below (*Statement of Facts in Opposition to Summary Judgment* at p. 17, ¶ 138) and (*Brief on Merits* 33-34), Bussell was given 3-5 times the work of others after she complained, was sent home (suspended) without pay (which caused her to suffer economic loss), and she was not made a permanent Motorola employee, which caused her to suffer economic loss. Even under prior precedent, such economic loss is clearly actionable for a retaliation claim. *Gillis v. Georgia Dep't of Corr.*, 400 F.3d 883 (11th Cir. 2005). Being subjected to such adverse action would clearly dissuade a reasonable person from complaining of sexual harassment.

Bussell clearly argued below that she had direct evidence of sexual harassment, retaliation, and constructive discharge. *See Bussell's Statement of Disputed Facts in Opposition to Defendants' Motions for Summary Judgment* (pp. 13, 15, 16, 127, 18; ¶¶ 88, 114-16, 120, 125-27, 135), and *Memorandum of Law in Opposition to Summary Judgment* (pp. 2, 8, 13-16, 17, and 20), and (*Eleventh Circuit Brief* at pp. 26, 30, 31-32, 33, and 35). *See also* (*Petition for En Banc Review* at 15).

The Defendants argue that the harassment stopped by December 2000, but there is disputed evidence concerning that issue, because Karge admitted that Bussell was still complaining about sexual harassment after the December 26, 2000, meeting she had with Covington, as follows:

> Q: So, was Megan [sic] complaining about harassment after she met with Marcy [Covington] that day?
>
> A: When we met with Marcy was after the meeting and – in about a – two or three days later Meghan came back saying that it's still continuing.

(R2-112-133-34).

II. THERE IS A SPLIT IN THE CIRCUITS CONCERNING THE APPLICATION AND INTERPRETATION OF *WHITE*.

The Defendants argue that *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006) is too new an opinion for the Court to interpret it at this point, but research shows that each court of appeals has approximately 50 decisions interpreting *White's* scope.

Despite the evidence of adverse employment action demonstrated by Bussell, the Eleventh Circuit simply concluded that none of it individually was materially adverse to Bussell. (*See Appx.* at 2a, cert. pet.). That is not the *White* standard, as the *White* standard is that if the adverse employment action "might have dissuaded a reasonable

worker from [complaining of sexual harassment]" the adverse action is actionable. *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006). Some courts of appeal are following the Eleventh Circuit's rendition of the test (is the adverse action materially adverse), *Dilettoso v. Potter*, 2007 WL 2051415, *2 n.3 (9th Cir., July 17, 2007); *Moore v. City of Philadelphia*, 461 F.3d 331, 346 (3d Cir. 2006), and others are following the rendition suggested here, and set forth clearly in *White* (that if the action could have dissuaded a reasonable worker from complaining it is actionable). *Kessler v. Westchester County Dep't of Soc. Servs.*, 461 F.3d 199, 207 (2d Cir. 2007); *Clegg v. Arkansas Dep't of Correction*, ___ F.3d ___, 2007 WL 2296414, *5 (8th Cir. 2007). This split in the circuits should be resolved, and in this case, the adverse actions Bussell was subjected would have dissuaded a reasonable worker; thus, the Eleventh Circuit's failure to apply *White* properly prejudiced her.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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